In The

SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 476.

BRANIFF AIRWAYS, INCORPORATED, Appellant,

V.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT, ET AL., Appellees.

Appeal from the Supreme Court of the State of Nebraska.

BRIEF OF APPELLEE.

Clarence S. Beck,
Attorney General,
C. C. Sheldon,
Assistant Attorney General,
of Lincoln, Nebraska,
Counsel for Appellee.

WEKESSER PUBLISHING CO., Law Briefs, Lincoln, Nebr.

BLEED THROUGH

BLURRED COPY

INDEX

Subject Index

Cases Cited

Statutes Cited

Constitutional Provisions Cited

Miscellaneous

In The

SUPREME COURT OF THE UNITED STATES

—:—

October Term, 1953

No. 476.

—:—

BRANIFF AIRWAYS, INCORPORATED, Appellant,

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT, ET AL., Appellees.

—:—

Appeal from the Supreme Court of the State of Nebraska.

—:—

BRIEF OF APPELLEE.

—:—

OPINION BELOW.

The sole opinion below is that of the Nebraska Supreme Court, entitled *Mid-Continent Airlines, Inc., now Braniff Airways Incorporated* v. *Nebraska State Board of Equalization and Assessment, et al.;* which is officially reported at 157 Neb. 425, 59 N. W. (2d) 746. Probable jurisdiction was noted by the Court on January 4, 1954.

JURISDICTION.

Jurisdiction of this Court has been invoked under the provisions of Title 28, U. S. C. #1257(2). The appellees have made no effort to, and do not now, resist jurisdiction, except to such extent as our Point V herein might be regarded as resistence of jurisdiction.

QUESTION PRESENTED.

The basic question presented for determination by this Court is whether the Nebraska taxing statute (Sections 77-1244 through 1250, Reissue, Revised Statutes of Nebraska, 1943, appearing at page 20 of the Record and also in App. B of Brief of the Appellant) is violative of Article I, Section 8, Clause 3 of the Constitution of the United States.

STATUTES AND CONSTITUIONAL PROVISIONS INVOLVED.

It is the position of the appellees that the Nebraska statute here under question and Article I, Section 8, Clause 3 of the Constitution of the United States, are the only provisions here involved. Appellant, however, states that also involved are the Civil Aeronautics Code and Article I, Section 9, Clause 5 and Section 10, Clauses 2 and 3 of the Constitution.

STATEMENT OF THE CASE.

This litigation was commenced by the appellant as plaintiff in an original action for declaratory judgment before the Nebraska Supreme Court. The matter was presented to the Nebraska Court, as here, on the basis

of a stipulation of agreed facts. The Nebraska Court upheld the statute involved and dismissed the petition. The matter now comes before this Court as an appeal from the judgment of the Nebraska Court.

STATEMENT OF THE FACTS.

The facts upon the basis of which this cause is presented are contained in the comparatively brief Stipulation of Facts (R. 10, also appearing in Brief of the Appellant, App. C).

We accept the Epitomization of Stipulation of Facts, set forth at page 14, et seq., of the Brief of the Appellant, as being a fair summary of the stipulation, except for the argumentative aspects of numbered paragraphs 13, 26 and 27 of such epitomization.

SUMMARY OF ARGUMENT.

Point I—Airplanes equipped for flight, moving from the state in which the owner has its operating base, which state is neither the principal place of business of the owner nor the state of its incorporation, in a continuous circuit of interstate transportation, over fixed routes and according to regular schedules, within and through a group of states, of which Nebraska is one, acquire a tax situs in Nebraska such as will support the imposition of an apportioned ad valorem property tax upon a proportionate part of the value of such airplanes fairly related to their use within the State of Nebraska.

Point II—Pre-emption of the field of air commerce by Congress does not prohibit the imposition of fair

and reasonable state ad valorem property taxes upon flight equipment employed in interstate commerce within the taxing state.

Point III—A state ad valorem property tax upon vehicles of interstate commerce, apportioned according to use within the taxing state, does not constitute an impost or duty within the meaning of Article I, Section 9, Clause 5 or Section 10, Clause 2 of the Constitution; nor does such a tax constitute tonnage duty within the meaning of Article I, Section 10, Clause 3 of the Constitution.

Point IV—This Court will indulge every presumption in favor of a state's right to tax and will interfere only when a clear and demonstrated usurpation of power exists.

Point V—In a situation involving situs for the imposition of a state apportioned ad valorem property tax upon vehicles engaged in interstate commerce, wherein representatives of the taxing authority have stated that the statute in question covers an average portion of the property within the state throughout the taxing year, a claim that the property acquired no situs for taxation within such state will be of no avail in the absence of any showing of a lack of administrative or judicial remedy for correcting errors of assessment within the state.

ARGUMENT.

Point I.

Airplanes Equipped for Flight, Moving from the State in Which the Owner Has Its Operating Base, Which State Is Neither the Principal Place of Business of the Owner Nor the State of Its Incorporation, in a Continuous Circuit of Interstate Transportation, Over Fixed Routes and According to Regular Schedules, Within and Through a Group of States, of Which Nebraska Is One, Acquire a Tax Situs in Nebraska Such as Will Support the Imposition of an Apportioned Ad Valorem Property Tax Upon a Proportionate Part of the Value of Such Airplanes Fairly Related to Their Use Within the State of Nebraska.

NORTHWEST AIRLINES, INC. v. STATE OF MINNESOTA,

To date, the only decision of this Court involving the taxation of flight equipment engaged in interstate air commerce is that of *Northwest Airlines* v. *State of Minnesota*, 322 U. S. 292, 88 L. Ed. 956, 64 S. Ct. 950. Although somewhat distinguishable in its facts from the case now before the Court, the issues involved and the concepts enunciated by the Court in that case are such as to make appropriate a rather detailed consideration of the case. Seldom will there be found a reported case the analysis of which is more challenging.

The conclusion and judgment of the court was announced in an opinion written by Mr. Justice Frankfurter, speaking for himself and Mr. Justice Douglas and Mr. Justice Murphy. Mr. Justice Black and Mr. Justice Jackson concurred in the judgment of the court,

but each wrote separate concurring opinions in order to express views at variance with, or not contained in, the opinion announcing the decision. Mr. Chief Justice Stone wrote a dissenting opinion, in which he was joined by Mr. Justice Roberts, Mr. Justice Reed and Mr. Justice Rutledge.

As was pointed out by Justice Black in his concurring opinion, the differing views of the members of the Court illustrate the inherent difficulties encountered in the judicial formulation of general rules to meet the national problems arising from state taxation which bears upon interstate commerce.

The following facts may be ascertained from the opinions in the *Northwest Airlines case*:

1. The owner of the fleet of airplanes upon which Minnesota imposed a full value ad valorem personal property tax was a corporation organized and existing under and by virtue of the laws of Minnesota.

2. The home port of the fleet, registered with the Civil Aeronautics Authority, was in Minnesota.

3. The principal place of business of the corporation was Minnesota.

4. None of the units of the fleet of airplanes, which were continuously engaged in interstate commerce, were outside of Minnesota at all times during the tax year.

5. That all of the flight equipment involved was continuously engaged in interstate commerce in and out of Minnesota and other states, and it

did not appear that there was some part of the equipment within Minnesota at all times throughout the year.

Opinion Announcing Decision.

In the opinion announcing the decision of the Court, to the effect that Minnesota possessed authority to impose an ad valorem personal property tax upon the full value of all of the units of the fleet, notwithstanding the fact that some of the airplanes were not within Minnesota on assessment day, it was stated that the tax was upon property of a corporation no part of which receives permanent protection from any other state; and that, on the basis of rights which only Minnesota originates and continues to safeguard, she alone can tax property which is permanently attributable to Minnesota and no other state. It was further said in the opinion that the case was governed by the ruling in *New York ex rel. New York C. & H. R. R. Co.* v. *Miller*, 202 U. S. 584, 50 L. Ed. 1155, 26 S. Ct. 714, which sustained a New York tax measured by the full value of railroad rolling stock of a domestic corporation, no part of which was continuously outside of the State of New York during the tax year. Justice Frankfurter went on to say that the doctrine of apportioned taxation as applied in *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 S. Ct. 36, 4 Ann. Cas. 493, is not applicable.

It is further stated, in the opinion, that the fact the Northwest Airlines may have paid taxes on some proportion of its fleet in other states does not abridge the taxing power of Minnesota; that the taxability of any part of the fleet by other states was not before the

Court; and that there had been no showing, as there had been none in the *Miller case,* that any defined part of the domiciliary corpus had acquired a taxing situs elsewhere.

Justice Frankfurter stated the decisive feature of the *Miller case* to be the fact that it had not appeared that any defined part of the domiciliary corpus had acquired a permanent location, i. e., a taxing situs, elsewhere; and that this having been the decisive feature of the *Miller case* was subsequently recognized by the Court in *Johnson Oil Ref. Co.* v. *Oklahoma,* 290 U. S. 158, 78 L. Ed. 238, 54 S. Ct. 152, which latter case was strongly urged by Northwest in opposition to the Minnesota full value tax. In the *Johnson Oil case* the state seeking to impose the full value tax upon the entire fleet of tank cars was a foreign state, not the home state of Illinois; and, accordingly, Justice Frankfurter stated, that case fell outside the *Miller case,* whereas, the *Northwest case* comes within the application of the *Miller case.*

Further, it was said, in the opinion, that the doctrine of apportionment in the taxation of instrumentalities engaged in interstate commerce, introduced by *Pullman's Palace Car Co.* v. *Pennsylvania,* is inapplicable, as the principle of that case is that a non-domiciliary state may tax an interstate carrier engaged in running railroad cars into, through and out of the state, and having at all times a large number of cars within the state; that the doctrine of tax apportionment for instrumentalities engaged in interstate commerce has not been extended to tax units of interstate commerce which visit for fractional periods of the taxing year. For example, Justice Frankfurter points out, in the

Pullman Car case it appeared that "The coaches of the company * * * are daily passing from one end of the state to the other," and "that it is continuous protection by a non-domiciliary State—that is protection throughout the tax year—which has furnished the constitutional basis for tax apportionment with respect to interstate commerce situations." Justice Frankfurter stated that the taxing power of the domiciliary state has a very different basis; that no judicial restraint has been applied against the power of the domiciliary state to tax all property of its residents, except to such property (or a portion of fungible units) as is permanently situated in a state other than the domicil; and that "permanently" means continuously throughout the year, not a fraction thereof, whether days or weeks. Justice Frankfurter adds that such was the meaning of the unanimous decision in the *Miller case*, or the *Miller* case decided nothing, and quotes the following language from the opinion of Mr. Justice Holmes in that case: "But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts." Then Justice Frankfurter goes on to conclude that surely the power of the state of origin to "tax its own corporations for all their property within the state during the tax year" cannot constitutionally be affected whether the property takes fixed trips or indeterminate trips so long as

the property is not "continuously without the state during the whole tax year." (p. 594).

With respect to the apportionment doctrine of taxation, Justice Frankfurter declared:

> "Although a part of the taxing systems of this country, the rule of apportionment is beset with friction, waste and difficulties, but at all events it grew out of, and has established itself in regard to, land commerce."

The final observation of Justice Frankfurter concerning the rule of the *Miller case,* which he declared applicable in the *Northwest case,* is that such rule does not subject property permanently located outside of the domiciliary state to double taxation; and that not to subject property which has no locality other than the state of its owner's domicile to taxation in the domiciliary state would free such "floating property" from taxation everywhere.

Concurring Opinion of Mr. Justice Black.

Mr. Justice Black, although concurring in the conclusion and judgment in the *Northwest case,* did not wholly accept the views expressed in the opinion of Mr. Justice Frankfurter announcing the judgment. Justice Black agreed that the State of Minnesota was empowered to impose the full value ad valorem tax upon the entire Northwest Airlines fleet engaged in interstate commerce; but he would not have foreclosed consideration of the taxing rights of states other than Minnesota. Justice Black expressed doubt that a state is prohibited from applying its general tax laws to property engaged in interstate commerce unless such

state is able to make two correct prophecies as to what this Court ultimately may hold, namely: (1) The permissible total of taxes which might be imposed by an aggregate of states on the property engaged in interstate commerce among such states; and (2) The proportion of this total which the state itself fairly may claim. It was suggested by Justice Black that the problems call for Congressional action definitive of the taxing power of states with respect to taxation of instrumentalities of interstate commerce.

Concurring Opinion of Mr. Justice Jackson.

Mr. Justice Jackson also concurred with the conclusion and judgment upholding the full value tax imposed by the State of Minnesota upon all of the Northwest Airlines flight equipment engaged in interstate commerce; but he declined to accept the opinion announcing the judgment of the Court, for the reason that since Minnesota was the "home port" of the fleet in an operational as well as domiciliary sense, the Court should have also declared the Minnesota tax to be exclusive of any other tax upon the same property by other states.

Dissenting Opinion of Mr. Chief Justice Stone, Mr. Justice Roberts, Mr. Justice Reed and Mr. Justice Rutledge.

Four members of the Court (Chief Justice Stone, Justice Roberts, Justice Reed and Justice Rutledge) dissented from the decision in the *Northwest case*. The basis for the dissent was that, in view of the clear right of non-domiciliary states to impose an apportioned property tax upon the flight equipment op-

erated within and through their boundaries, to permit Minnesota the right to tax the same equipment at full value would necessarily constitute an undue burden upon interstate commerce, violative of the Commerce Clause of the Constitution.

In their opinion, written by Chief Justice Stone, it was noted that the decisions of this Court clearly establish that the power of states to tax chattels depends upon physical presence and that such power is neither added to nor detracted from by the fact of domicile, except in those cases where tangibles have nowhere acquired a tax situs based upon physical presence and therefore remain taxable at the domicile of the owner. As examples of situations in which the movement of vehicles into other states may be so sporadic as to acquire no tax situs in such other states and hence remain taxable for full value by the state of the owner's domicile, the *Miller case,* supra, and *Southern P. Co.* v. *Kentucky,* 222 U. S. 63, 56 L. Ed. 96, 32 S. Ct. 13 (322 U. S. at 312), were cited.

Chief Justice Stone observed that the *Northwest Airlines case* squarely raises the issue which the *Miller case* found unnecessary to decide, but an issue which this Court has consistently answered by requiring apportionment according to regular use within and without the taxing state. In the *Miller case* the cars moved about almost at random. Whereas in the *Northwest case,* said Chief Justice Stone, although no particular plane was constantly within any state, the planes are "continuously engaged in flying from state to state" on "regular schedules along fixed routes"; and that "an average number or a percentage of the total is

regularly, i.e., 'permanently' within each of the states through which they pass." (322 U. S. at 321, 322).

Regarding the adoption of the exclusive "home port" theory of taxing aircraft, Chief Justice Stone declared that the same difficulties which led to the abandonment of that doctrine with respect to taxation of vessels would be encountered, i.e., the fact that other states afford the same services and facilities, for practical purposes.

Obviously the dissenting members of the Court visualized the appearance of a case just such as the matter now at bar. In criticizing the theory of basing a full value tax upon the peculiar domiciliary status of Minnesota, it was observed that, even if the record in the *Northwest case* justified a finding that Minnesota alone could be regarded as the "home state," there is "no assurance that in taxing planes operated by other and more complex business organizations, one state will have any greater claim to that designation than several others, and the Court's opinion furnishes no test to guide in the choice among them, if choice has any relevance." (322 U. S. at 319).

With respect to the application of the doctrine of tax apportionment and the solution of the attendant problem of multiple taxation, Chief Justice Stone stated that this Court has recognized that "such instruments of interstate transportation, at least if moving over fixed routes on regular schedules, may thus acquire a tax situs in every state through which they pass. And it has met the problem of burdensome multiple taxation by the several states through which such vehicles pass by recognizing that the due process clause

or the commerce clause or both preclude each state from imposing on the interstate commerce involved an undue or inequitable share of the tax burden." (322 U. S. at 313, 314).

MEANING AND EFFECT OF NORTHWEST AIRLINES CASE.

Due to the peculiar relationship between the State of Minnesota and the airline corporation in the *Northwest case,* upon the basis of which the right of Minnesota to tax all of the fleet was sustained, it is clear that in the case at bar no state has the power to impose a full value tax upon the interstate fleet of the appellant.

The importance of the *Northwest case,* with respect to its application in the case at bar, lies not so much in the holding of the Court as in the views expressed by the various members of the Court. In order to fully present our position herein, we find it necessary to undertake an anlysis and appraisal of the four separate opinions which were issued in that case.

We have previously noted that the opinion announcing the decision of the Court, written by Justice Frankfurter and shared by Justices Douglas and Murphy, expressly declined to take any position as to any further taxability of the fleet by states other than Minnesota. It is with great caution and considerable reluctance that we indulge in some conjecture over the possible conclusions to be drawn from the *Northwest case* regarding the possibility of an apportioned tax with respect to flight equipment engaged in interstate air commerce under circumstances such as are present in the case at bar.

It is evident that six members of the Court (Chief Justice Stone, together with Justices Roberts, Reed and Rutledge, who joined in the dissenting opinion; and Justices Black and Jackson, each of whom concurred separately) all were of the opinion that the decision of the Court as announced did not deny or foreclose the right of other states to tax some portion of the interstate air fleet. Their conclusion, indeed, finds support in the language of the opinion of Justice Frankfurter wherein, following a declaration as to the unsatisfactory aspects of the doctrine of tax apportionment, it was stated, at page 300 of the U. S. Report:

> "To what extent it (the doctrine of tax apportionment) should be carried over to the totally new problems presented by the very different modes of transportation and communication that the airplane and radio have already introduced * * * raise questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship." (Parenthetical comment ours.)

The language quoted would seem to afford some basis for an implication that tax apportionment might be applicable to interstate air fleets, coupled with a suggestion that the extent and manner of such application should be given appropriate consideration by Congress.

This much is clear, the decision in the *Northwest Airlines case* can in no way be regarded as authority for denial of the tax involved in the case at bar. How-

ever, the appellant has sought to interpret the case in such a way as to support its position that tax apportionment cannot be extended to the realm of interstate air commerce.

We concede that in the opinion announcing the Northwest Airlines decision, it was stated that the doctrine of apportionment has never been extended to units of interstate commerce which visit a state for "fractional periods" of the taxing year; that it was stated that the only constitutional basis for tax apportionment by non-domiciliary states in interstate commerce situations is the continuous protection of the units involved by the state seeking to impose the apportioned tax, and that the term "continuous" must be defined as meaning protection "throughout the tax year", as opposed to "a fraction thereof, whether days or weeks." We further concede that it was stated, in the opinion referred to, that the power of a domiciliary state to tax its own corporations for all their property within the state during the tax year cannot constitutionally be affected by whether the property takes fixed trips or indeterminate trips without the state, but that not to subject property which has no locality other than the domicile of its owner would "free such floating property from taxation everywhere."

Bearing in mind that the flight equipment involved in the *Northwest Airlines case* was continuously operated within several states according to regular schedules and over fixed routes, very much like the operation of the flight equipment in the case at bar, the statements in the opinion referred to afford some basis for the appellant's contention that the par-

ticular opinion is support for denial of any right to apportioned tax by non-domiciliary states in a situation such as existed in the *Northwest case* and such as exists in the case at bar.

For these reasons, and perhaps with insufficient adherence to the better part of valor, we are compelled to suggest that any implication which might be drawn from the *Northwest Airlines case,* to the effect that the doctrine of tax apportionment cannot be applied to afford a basis for taxation of flight equipment by non-domiciliary states, is not supported by the views of a majority of the Court who participated in that case. To be specific, the four dissenting Justices expressly declared the apportionment doctrine to be applicable to interstate air commerce, even to the extent of prohibiting a domiciliary state, such as was Minnesota, from imposing a tax on any other basis than apportionment in common with other states within the system of transportation; and Justice Black, although he would permit a full value tax by a state which occupied a peculiar domiciliary status such as Minnesota, clearly was of the opinion that neither "in reason or in the Constitution" is there anything which should prohibit proportionate taxes by "an aggregate of states" upon property involved in interstate commerce. Justice Black did, however, take note of the problems which might be expected to arise in the application of the apportionment doctrine to the field of air transportation; and he very appropriately suggested the need of formulative Congressional action. Thus, the view that the apportionment doctrine is inapplicable to interstate air commerce of the nature involved in the case at bar could not possibly be at-

tributed to any greater number than four of the nine members of the Court who took part in the *Northwest case.*

Congressional Interest.

Apropos of Justice Black's suggestion of needed Congressional action with respect to the application of tax apportionment to air commerce, it might be noted in passing that, prompted by the invitation presented in the *Northwest case,* Congress has undertaken to concern itself with the problem. Pursuant to the direction of Public Law 416 of the Seventy-eighth Congress, the Chairman of the Civil Aeronautics Board has submitted certain conclusions and recommendations with respect to multiple taxation of air commerce, the same being contained in House Document No. 141 of the 79th Congress, 1st Session. Although the fairness of the allocation formulae contained in the Nebraska statutes here under consideration is not challenged by the appellant, it is interesting to note the following reference to allocation contained in House Document 141, at page 45:

> "Allocation of the tax base provides a method for avoiding multiple taxation that can be applied to air transport without material conflict with existing State laws and practices. Few, if any, of the States have rigid allocation formulas written into their tax laws applicable to aircraft or air transport companies. The provisions with respect to allocation are generally sufficiently flexible to accomodate any realistic policy of apportionment."

The Miller Case

The opinion in which the judgment was announced in the *Northwest Airlines case,* written by Mr. Justice

Frankfurter, contains several citations of *New York ex rel. New York C. & H. R. R. Co.* v. *Miller,* supra, upon the basis of which decision it is declared that no part of the Northwest Airlines interstate fleet acquired a tax situs in any of the several non-domiciliary states within and through which the fleet operated, and that the power of a domiciliary state, from which the entire fleet is not continuously absent during the entire tax year, to tax its own corporation for the full value of all of the fleet cannot constitutionally be affected by the fact that the property involved makes trips within and through other states, regardless of whether such trips be fixed or indeterminate.

There can be no dispute but that the decisive feature of the *Miller case* was the fact that the vehicles of interstate commerce there involved had not acquired a tax situs in any of the non-domiciliary states within and through which they were operated, as a result of which the full value of such vehicles was permitted to be taxed by the state of the owner's domicile. However, we cannot agree that there is anything in the language of the opinion announcing the unanimous decision in the *Miller case* from which to draw a conclusion that a fleet of airplanes or other vehicles operating in interstate commerce over fixed routes and according to regular schedules, although not without the domiciliary state at all times, may not acquire a tax situs in the non-domiciliary states such as will support a property tax fairly apportioned according to the use of such fleet within the non-domiciliary states. We submit that the opinion of this Court in the *Miller case* was not authority upon the basis of which to have decided the *Northwest Airlines case;* and that, a fortiori,

it is not authority upon which to defeat the tax in the case at bar, which is not even complicated by the circumstance of the fleet operating through one particular state which is the state of incorporation and also the registered home port of the fleet and the principal place of business, i. e., the home state in an operational as well as domiciliary sense, such as was the situation in the *Northwest Airlines case.* We interpret the decision in the *Miller case* as being nothing more than a finding by the Court that, because of the sporadic, irregular, random use of the railroad cars in question within non-domiciliary states, the cars could not be regarded as having acquired a tax situs to any extent in such non-domiciliary states and, accordingly, that the domiciliary state from which such cars were not continually absent during the tax year was permitted to impose a tax based upon the full value of such cars. There is nothing in the opinion to justify a conclusion that the decision would have been the same even though the cars were operated within the non-domiciliary states with frequent regularity and according to definite schedules. In the *Miller case* the domiciliary state, New York, had imposed a tax upon the railroad corporation based upon the full value of rolling stock which was occasionally used beyond the boundaries of the State of New York. The corporation contended that it should not be taxed on the basis of the full value of rolling stock which was used partially in other states. In an effort to support its contention the company offered evidence to show that "a certain proportion of cars, although not the same cars, was continuously without the state during the whole tax year." It was clearly established by the evidence, in fact conceded by the company, that none of the rolling stock

was outside of the domiciliary state during the whole tax year and that the cars were not regularly employed outside the domiciliary state. In denying the contention of the railroad, the Court said that the domicile retains the power to tax all of the property of its corporations, "notwithstanding its occasional excursions to foreign parts." We submit that the language "occasional excursions" has a distinct and unambiguous meaning which cannot be paraphrased away into meaning "continuous interstate operations over fixed routes and according to regular schedules." Yet that is the meaning which the appellants herein would have ascribed to the language of the *Miller case* opinion, with apparent support by some of the language in one of the opinions issued in the *Northwest Airlines case*. The untenability of what we regard as a distortion of the *Miller case* decision is further illustrated by the Court's discussion of *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876. It had been urged by the railroad, in the *Miller case*, that the situation was but the complement of the *Pullman Car case* which had sustained the application of an apportioned tax by a non-domiciliary state through which the rolling stock was operated in interstate commerce, and that, by analogy, the value basis upon which the domiciliary state of New York could tax the railroad property in the *Miller case* should be reduced to an extent corresponding to the taxes which might be levied by other states under the authority of the *Pullman Car case*. In rejecting this theory advanced by the railroad in the *Miller case*, the Court observed that in the *Pullman Car case* it had appeared that:

> "The same cars were continuously receiving the protection of the (non-domiciliary) state, and,

therefore, it was just that the state should tax a proportion of them." (202 U. S. at 597).

The Court then went on to distinguish between the regular use which existed in the *Pullman Car case* and the sporadic use which existed in the *Miller case*, which the Court was then deciding, saying:

> "Whether, if the same amount of protection had been received in respect of constantly changing cars, the same principle would have applied was not decided (in the Pullman Case), and it is not necessary to decide now. In the present case, however, it does not appear that any average of cars was so continuously in any other state as to be taxable there. The absences relied upon were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by * * * arbitrary convenience * * *." (p. 597, 598). (Parenthetical comment in both quotations ours.)

It appears to us that the unavoidable significance of the foregoing analysis of the *Pullman Car case*, made by the Court in the *Miller case*, is that the non-domiciliary states involved in the *Miller case* would have no power to tax any portion of the rolling stock for the sole reason that the interstate use of such equipment was not regular and habitual; and, by inference, that had the rolling stock been a fleet of cars all of which were continuously employed in systematic interstate commerce over definitely prescribed routes and according to pre-established schedules, the Court would have found that such a fleet had acquired a tax situs such as would permit taxation of some proportion of the fleet by the various non-domiciliary states embraced within the system. The *Miller case* decision does not

support the proposition that all tangible property which is not outside the domiciliary state at all times may be taxed at full value by the domiciliary state; nor does the *Miller* decision support the correlative proposition that a non-domiciliary state may not, under any circumstances, acquire jurisdiction to tax tangible property which is within the domiciliary state at some time during the tax year; nor does the *Miller case* support the further correlative proposition that tangible property, some part of which does not remain constantly within a non-domiciliary state at all times during the tax year, may never acquire a tax situs such as to afford a measure of taxation of such property by such non-domiciliary state. Not only are such propositions without support from the decision in the *Miller case*, or other decisions of this Court, but the intolerable results which might arise from their application militate against their adoption at any time. Under the propositions above discussed, if carried to their logical concluson, the following situations might occur: (1) Assuming that a fleet of airplanes, a fleet of railroad cars or a fleet of motor trucks, were engaged in interstate commerce within a number of states in a system of transportation conducted according to regular schedules and over fixed routes and that the domiciliary state of the corporation owning the transportation company was not one of the states within which the transportation system regularly operated. Nevertheless, if at some time once each year each of the fleet units were taken into the domiciliary state, though only momentarily and for no purpose related to the interstate transportational system, the entire fleet would then be subject to a full value property tax by the domiciliary state, and the non-domiciliary states within which

the system operates would be powerless to tax the fleet to any extent; or, (2) Assuming that of a fleet of vehicles (land, water or air) engaged in interstate commerce within a number of states, conducted according to regular schedules and over fixed routes, but not within the state of owner's domicile, once each year every unit were taken into some non-domiciliary state within which the transportational system did not operate; in such case, the result would be complete immunity of the fleet from property taxation by any state.

Comparison of Cases Before and After Miller Case.

We contend that both before and since the *Miller case* this Court has recognized the principle that a fleet of vehicles engaged in interstate commerce may acquire a tax situs in non-domiciliary states such as will support an apportioned property tax, notwithstanding the fact that there may not be some vehicle of the fleet within the taxing state at every instant, or even every day, of the tax year. *Northwest Airlines* v. *Minnesota,* supra, 322 U. S. at 324. Nor is the *Miller case* any departure from this principle. We further contend that a situs to support the imposition of an apportioned property tax by a non-domiciliary state upon a fleet of vehicles engaged in interstate commerce, be it land, water or air, exists when such vehicles travel within such non-domiciliary state as components of a fleet continuously engaged in a system of interstate commerce according to regular schedule and over fixed routes. Such is the factual situation in the case at bar. This was also the factual situation in the *Northwest Airlines case*. However, due to the peculiar status of the taxing domiciliary state of Minnesota, upon which the judg-

ment of the court in that case was predicated, the principle which we here advance is left unimpaired by the decision in the *Northwest case*.

An interesting case, affirmatory of our position herein, which was decided by the Circuit Court of Appeals for the District of Columbia, is *District of Columbia* v. *Smoot Sand & Gravel Co.*, 184 F. (2d) 987, cert. denied 340 U. S. 933; the applicability of which case the appellant seeks to avoid by relating that the case involved water transportation. The Circuit Court in the *Smoot case* found that the vessels of the respondent, a foreign corporation, "came into the District from places of deposit on an average of once a day but spend more time out of the District than in the District;" and that some of the vessels were licensed and enrolled at the port of Alexandria, Virginia (p. 989). After reviewing the decisions of this Court relating to apportioned property taxes, the Circuit Court, at page 991 of the Federal Report, declared:

> "Under the foregoing decisions there can be little question that respondent's vessels have a situs in the District which would support an apportionment tax. The basis underlying the cases is explained and left unimpaired in *Northwest Airlines* v. *Minnesota* * * *."

The Court went on to say:

> "The facilities of the community are available to it and to its equipment, which moves in and out of the District not in a temporary or transient fashion but in a constant and continuing pattern of business operations. Presence of the vessels in the District is neither incidental, sporadic nor spasmodic. They are 'habitually employed' in the District."

The principle which we advance was recognized, by necessary implication, in the frequently cited case of *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 50 L. Ed. 150, 26 S. Ct. 36, which was decided before the *Miller case.* In the *Union Refrigerator case* this Court denied the power to a domiciliary state to impose a property tax upon cars regularly employed within other states, although it was clearly established that all of such cars came into the domiciliary state at times during the tax year.

The principle which supports the right of Nebraska to impose an apportioned property tax upon the flight equipment involved in the case at bar, was recognized in *Johnson Oil Refining Co.* v. *Oklahoma,* 290 U. S. 158, 78 L. Ed. 238, 54 S. Ct. 152, decided some ten years prior to the *Miller case.* It appeared in the *Johnson Oil Refining Co. case* that the owner of the tank cars involved was an Illinois corporation which also had its principal place of business in that state; that the tank cars involved were used in the transportation of oil products from the owner's refinery located in Oklahoma, although sometimes cars were loaded at refineries in states other than Oklahoma; that in connection with each shipment the practice was to bill back the cars to the Oklahoma base of operations; that the cars were "almost continuously in movement" and were "almost exclusively" engaged in interstate commerce; that the cars were occasionally, but infrequently, used in conection with an oil plant of the corporation located in the domiciliary state of Illinois. The specific issue presented by the *Johnson Oil case* was whether Oklahoma had the power to impose a property tax upon the entire fleet of tank cars, as opposed to an appor-

tioned tax based upon the average number of cars within the state on any one day, or some other formula designed to fairly apportion the tax according to the use within the state compared with the use without the state. This Court decided that the tax should be apportioned and that Oklahoma did not have the power to impose a full value tax. Although the specific issue presented in that case is distinguishable from the issue involved in the case at bar, the principles recognized in the unanimous decision of the Court clearly support the application of an apportioned tax such as the Nebraska tax in the case at bar. The opinion in the *Johnson Oil case* was prefaced with a statement of the basic premise that the mere fact property is engaged in interstate commerce "does not make it immune from a non-discriminatory property tax in a State which can be deemed to have jurisdiction." The remainder of the opinion is devoted to a spelling out of what is regarded as providing "jurisdiction" for the imposition of a nondiscriminatory apportioned property tax upon vehicles engaged in interstate commerce. The Court declared, at page 162 of the U. S. Report of the opinion:

> "While, in this instance, it cannot be doubted that the cars in question had acquired an actual situs outside the State of Illinois, the mere fact that the appellant had its refinery in Oklahoma would not necessarily fix the situs of the entire fleet of cars in that State. The jurisdiction of Oklahoma to tax property of this description must be determined on a basis which is consistent with the like jurisdiction of other states."

The Court further said:

> "When individual items of rolling stock are not continuously the same but are constantly changing,

as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits."

In conclusion, the court stated:

"Applying these principles, no ground appears for the taxation of all the cars of the appellant in Oklahoma. It is true that the cars went out from and returned to Oklahoma, being loaded and reloaded at the refinery, but they also entered and were employed in other States wher the oil was delivered. Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on the average were found to be physically present within the State."

The airline-appellant in the case at bar seeks to avoid the effect of the principle recognized in the *Johnson Oil case* by claiming the case is distinguishable on the facts due to the circumstance that a large average number of cars were present within the state at all times. This effort on the part of the appellant prompts us to clearly define our position herein. In the event the jurisdiction of a non-domiciliary state to impose an apportioned property tax upon a fleet of vehicles engaged in interstate commerce within such state cannot exist, under any circumstances, unless there is some vehicle of such fleet actually present within the taxing state at every minute throughout the taxing year, then, if such be the test, we would here and now concede that the State of Nebraska has no jurisdiction to impose the tax in question. However, such has never been the consensus of opinion of the members of this Court

at any time; and it most surely is not the meaning of the decision in the *Johnson Oil case.* True, some of the opinions have contained words such as "permanent" and "continuous" in describing the use of property outside a state of domicile, which use would have the effect of depriving the domiciliary state of power to impose a property tax upon that particular property. Howver, an examination of those opinions reveals that neither the effect nor the intent thereof is to prohibit the imposition of an apportioned property tax by a non-domiciliary state upon a fleet of vehicles engaged in interstate commerce within such state unless, in all events, there was some vehicle of the fleet actually present within the confines of the taxing state at every instant of the tax year. We believe that mere examination of these previous opinions leads to the conclusion that the words "permanently" or "continuously," when considered in view of the context in which used, were intended to convey the thought that the property must be used and employed habitually or consistently within the state as a part of a transportation system operated with regularity as to schedules and routes, as distinguished from property which is used and employed irregularly in the course of sporadic trips or random excursions regulated only by the arbitrary convenience of the owner. Whatever doubt might have prevailed as to this being the true meaning of such terms was completely dispelled by the opinion in the *Johnson Oil case* from which we have quoted in the next preceding paragraph hereof. The fact that the previous decisions, in connection with which words such as "permanently" and "continuously" appear, were cited in support of the propositions expressed in the *Johnson case* is unquestionable evidence of the fact that

the unanimous Court interpreted such previous opinions in the same manner as we advance herein. The physical facts in those earlier cases happened to be such that some vehicle invariably was physically present within each of the non-domiciliary states involved at all times during the tax period. Therefore, by the nature of the transportation systems involved in those cases, it could not matter whether the doctrine of non-domiciliary taxing jurisdiction were premised upon actual presence of some vehicle within the state at all times, or whether such jurisdiction required only consistent or habitual presence as an integral part of a system of transportation continuously engaging in interstate commerce with regularity as to schedules and routes. Although the necessity for clearly defining such a distinction was not presented in the *Johnson Oil case,* it is more than likely that the Court envisioned the possibility, if not inevitability, of such a fine distinction being required in the future, due to the rapid growth and diversification which was taking place in the transportation industry; and that, for this reason, Mr. Chief Justice Hughes, in drafting the opinion of the Court, by the use of language of a somewhat greater degree of refinement, made it eminently clear that the doctrine of tax apportionment by non-domiciliary states was not dependent upon the actual presence of some portion of the fleet at all times constantly throughout the tax year; but, rather, that the prerequisite to application of the doctrine was consistent, habitual use and employment of the vehicles within the state as a part of a system by which interstate commerce was conducted according to regular schedules and over fixed routes. This interpretation entails no violence whatsoever to the calculation of a "daily average number

of cars present" or the use of the mileage formula which was enunciated in the *Pullman Car case,* and which formula continues to epitomize the principle of fair apportionment; as an average number of cars present within a given state on a given day, within the meaning of the *Pullman Car case,* is capable of calculation notwithstanding the fact that the number of cars comprising the fleet might be so few that the average number present each day is but a fractional component of one car. Adoption of a contrary view, such as is contended for by the appellant herein, would result in the absurd result that if a fleet of railroad cars were being continuously operated in a system of interstate commerce over definitely established routes and according to a regular schedule under which there was at least one car within each state in the system at all times during every day of the taxing year, then each of the states could impose an apportioned property tax upon the fleet; yet, in the event the speed of the system were slightly increased, intentionally or otherwise, with the result that for one minute of each day (or, even, of but one day) in each of the states there were no cars present, then none of the states could tax under appellants theory that there was not "permanent" and "continuous" presence of some of the cars at all times.

The "Home Port" Theory of Taxation.

Mr. Justice Jackson concurred with the decision upholding the right of Minnesota to impose a full value tax upon the flight equipment involved in the *Northwest case;* but he refused to accept the opinion announcing the decision because the right of Minnesota to tax the property was not declared to

be exclusive of all other taxes upon the same property by other states. The position of Justice Jackson is clear. He feels that, on the basis of the "home port" doctrine historically applied to vessels engaged in water transportation, a fleet of airplanes engaged in interstate air commerce should be taxed at their full value in the home port state, and that the doctrine of apportioned taxation should never be extended into the realm of air commerce.

The basic premises of the theory of exclusive "home port" taxation appear to be that "aviation has added a new dimension to travel and to our ideas;" that "the air is too precious as an open highway" to permit surface proprietors or local governments to exclude or embarrass commerce therein; and that to authorize any local burden to be imposed upon air commerce would lead to the multiplication of such burdens throughout the country.

We cannot disagree that the advent of air travel has opened a vast new field of commerce. However, this most recent advancement in mode of travel is no more important a departure from the old than was the advancement from the horse-drawn vehicle to modern rail and motor carrier equipment. Precisely the same arguments could have been, in fact were, at first advanced against the imposition of local taxes upon vehicles employed in other forms of transportation which are now soundly established and operating in a generally satisfactory manner.

Be that as it may, as was pointed out by Justice Jackson, any indirect subsidization of the air industry in the form of immunity from state taxation must

come from Congress; and, in the absence of such congressional action, the sole function of the judiciary is to determine what taxes may be lawfully imposed. It has been suggested that the application to air commerce of the doctrine of exclusive taxation by the fleet home port is most consonant with the purposes of the Commerce Clause. However, Justice Jackson foresees the difficulties which would be encountered in the application of the home port doctrine to airplanes engaged in interstate commerce, for the reason that federal registration of airplanes does not establish statehood. Although the dual status which prevailed with respect to the State of Minnesota in the *Northwest Airlines case*, where Minnesota was both the corporate domicile and the federally registered home port, seemed to Justice Jackson sufficient basis for concluding that Minnesota was the "home port" within the meaning of the water transportation decisions, he acknowledges that in a situation in which the state of domicile and the state of federal registration were not the same, the basis for the conclusion would be absent. Accordingly, if we correctly interpret the meaning of the Justice Jackson opinion, in a case such as the one now at bar, where the state of corporate domicile and the state of federal registration are not the same, the home port doctrine of full taxation might not apply. This situation would then require a choice between two remaining possible bases for taxation. One is to permit full value taxation by the state of corporate domicile. However, Justice Jackson rejected this theory of taxation by his disagreement with the view of Justice Frankfurter that domicile was decisive in the *Northwest case*. As Justice Jackson pointed out, the domiciliary theory of taxation is un-

tenable because it would permit taxation by the domiciliary state of a fleet of vehicles engaged in interstate commerce, even though vehicles were not operated within the domiciliary state. The other possible basis for taxation in such a situation is the apportionment theory, which, of course, is the type of tax we seek to affirm in these proceedings. In advancing the home port theory of taxation as being the best analogy in existing decisions for application in the *Northwest Airlines case,* Justice Jackson expressed dissatisfaction with the idea of extending the apportionment doctrine to air commerce, saying, at page 306 of the U. S. Report:

> "It is established in our decisions and has been found more or less workable with more or less arbitrary formulae of apportionment. Nothing either in theory or in practice commends it for transfer to air commerce. A state has a different relation to rolling stock of railroads than it has to airplanes. Rolling stock is useless without surface rights and continuous structures on every inch of land over which it operates. Surface rights the railroad has acquired from the state or under its law. There is a physical basis within the state for the taxation of rolling stock which is lacking in the case of airplanes."

We cannot agree that there is no physical basis within the state for the taxation of airplanes. It is true, the nature of the "physical basis" is somewhat different in the case of airplanes than in the case of rolling stock, just as the means of locomotion of the two modes of transportation is somewhat different. It is said "rolling stock is useless without surface rights." It is difficult to conceive of any usefulness which might be attributed to an airplane which

had no contact with the surface and did not utilize various facilities located upon the surface of states through which it functioned in a system of interstate commerce. Without facilities to land and take off, without facilities by means of which passengers and freight can be conveyed to and from the airplanes, without facilities for obtaining fuel and other necessary servicing, what would be the value of a fleet of airplanes? Certainly it cannot be thought that any different conclusion is dictated by the fact that such facilities might be employed by virtue of leasing or other contractual arrangements, rather than under complete ownership of the airline company.

All Interstate Commerce Is on the Same Constitutional Footing.

Whatever justification there may have been, at the time of the *Northwest Airlines* decision, for a thought that different doctrines of taxation should be applied to different modes of transportation in interstate commerce, all justification has been completely dissipated by later decisions of this Court.

Ott v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 93 L. Ed. 585, 69 S. Ct. 432, sustained an apportioned ad valorem property tax imposed by the non-domiciliary State of Louisiana upon a line of barges operated in interstate commerce. Similarly to the airplanes in the case at bar, the barges in question were owned by a foreign corporation, the domicile of which was in Ohio. Also similarly to the case at bar, the barges were enrolled or registered outside of the non-domiciliary taxing state. A circumstance

not encountered in the case at bar was the fact the barges were not outside of the domiciliary state at all times during the tax year. The barges were within the taxing non-domiciliary state "for such comparatively short periods of time as are required to discharge and take on cargo and make necessary and temporary repairs." Needless to say, the vessels did not traverse the surface of the taxing state. This Court permitted the non-domiciliary State of Louisiana to levy an apportioned ad valorem tax upon the vessels. In sanctioning the application of the rule of tax apportionment such as developed in connection with rolling stock in interstate commerce, the Court, in the *Mississippi Valley Barge case*, completely abandoned the old home port theory of exclusive taxation of instruments of water transportation by the domicile of the owner. The Court declared that, so far as constitutionality was concerned, there is no practical difference "whether it is vessels or railroad cars that are moving in interstate commerce." The Court quoted from *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362 at 365, 84 L. Ed. 1254, 60 S. Ct. 968, saying that the problem under the Commerce Clause is to determine "what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions." Later in the opinion the Court stated, at page 175 of the U. S. Report:

> "We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises."

The appellant in the case at bar seeks to obscure the significance of the *Mississippi Valley Barge case* by pointing out the circumstances surrounding the

BLEED THROUGH

BLURRED COPY

question of whether the barges in question had acquired a tax situs within the non-domiciliary State of Louisiana. In an effort to revive its faltering proposition that constant presence of some portion of the fleet within the taxing state at all times during the tax year is necessary to create a tax situs, the appellant quotes from the language of the opinion in which the Court noticed a factual controversy on this score; which matter the Court declined to make any effort to resolve due to the fact that the Louisiana Attorney General had stated in his brief that the tax applied only to property within the state "throughout the taxing year." The Court then followed with the suggestion that any errors in assessment should have been corrected by resort to appropriate local administrative or judicial remedy. It is important to note that the reference to the property being within the taxing state "throughout the taxing year," was a direct quotation from the language of the brief, and was not the language of the Court. We have hereinbefore discussed rather fully the interpretation of the expressions such as "permanently" and "continuously", used in earlier opinions, as meaning consistently, regularly and habitually, rather than meaning absolutely at all times. We shall not indulge in a needless reiteration of the matter at this point. However, we do wish to emphasize that, rather than lending any support to the contrary interpretation, the opinion in the *Mississippi Valley Barge case* is entirely consistent with our interpretation. It is significant that this Court referred to the finding of the federal District Court to the effect that there was no showing that the particular portion of the property sought to be taxed was "regularly and habitually"

used in Louisiana. It was the decision of the District Court denying Louisiana the right to tax which this Court reversed in sustaining the apportioned tax. In the event it were the sense of this Court at that time that language, "regular and habitual" did not properly express the criterion for an apportioned tax, it is reasonable to assume the Court would have called attention to the fact.

However, the *Mississippi Valley Barge case* is important, not so much because of its approval of the imposition of an apportioned tax by a non-domiciliary state, as that doctrine had been previously established; but the great significance of the case lies in the fact that it was the first occasion for a judicial declaration of the practical fact that interstate commerce is any commerce between the states, regardless of the mode of intercourse by means of which such commerce is conducted.

The marked significance of this aspect of the *Mississippi Valley Barge case* was recognized in the later case of *Standard Oil Co.* v. *Peck,* 342 U. S. 382, 96 L. Ed. 427, 72 S. Ct. 309, in which the Court said, at page 385 of the U. S. Report:

> "Under the earlier view governing the taxability of vessels moving in the inland waters (St. Louis v. Wiggins Ferry Co., (U.S.) 11 Wall 423, 20 L ed 192; Ayer & Lord Tie Co. v. Kentucky, 202 US 409, 50 L ed 1082, 26 S Ct 679, 6 Ann Cas 205; cf. Old Dominion S. S. Co. v. Virginia, 198 US 299, 49 L ed 1059, 25 S Ct 686, 3 Ann Cas 1100) Ohio, the state of the domicile, would have a strong claim to the whole of the tax that has been levied. But the rationale of those cases

BLEED THROUGH

BLURRED COPY

> was rejected in Ott v. Mississippi Valley Barge Line Co., 336 US 169, 93 L ed 585, 69 S Ct 432, where we held that vessels moving in interstate operations along the inland waters were taxable by the same standards as those which Pullman's Palace Car Co. v. Pennsylvania, 141 US 18, 35 L ed 613, 11 S Ct 876, first applied to railroad cars in interstate commerce. The formula approved was one which fairly apportioned the tax to the commerce carried on within the state. In that way we placed inland water transportation on the same constitutional footing as other interstate enterprises."

We submit nothing could be more clear than the fact that this Court has now placed all interstate transportation enterprises on the same constituional footing with respect to taxation of property employed in interstate commerce; that is to say, equipment regularly and habitually used within states as a part of a system of interstate transportation is subject to ad valorem property taxes by each of such states, the tax to be fairly related to the use within each taxing state.

Standard Oil v. *Peck* is of further interest because of an acknowledgment by the Court, although tacit, so clear as to leave no room for doubt, that the application of the doctrine of apportioned taxation of instrumentalities of interstate commerce is not contingent upon actual presence of some part of the fleet within the taxing state at every moment of the year. We refer to that portion of the opinion wherein the Court was distinguishing the *Miller case*. The Court declared that in the *Miller case* it did not appear that any specific cars or any average of cars "was so

continuously in another state as to be taxable there." It is evident, from the use of the words, "so continuously," that the Court did not conceive the term "continuously" to mean that there must constantly be at least one unit of the fleet present at every instant of the year. The language of the Court is further authority for our interpretation that the basis for tax apportionment is habitual and regular presence.

Certainly the situation involved in the case at bar, wherein all units of a fleet of fourteen airplanes engaged in interstate commerce in a continuous circuit are within the State of Nebraska with such consistency and regularity that each day a total of four flights come into the state, accompanied with the usual incidents of receiving and discharging passengers and freight, fueling and servicing of equipment, is such as to clearly constitute presence within the state such as will create a tax situs to support a tax under the apportionment doctrine. To hold otherwise would be tantamount to a judicial grant of immunity from taxation for flight equipment, except in those rare instances when one particular state would be permitted to impose a full value tax upon the entire fleet under the domiciliary theory expressed in the *Northwest Airlines case*. When, if ever, the day may come that any commercial airline will reach such a degree of magnitude as to have a fleet so vast that one or more of the fleet planes is within each state of the system at every instant of the year, is a subject of speculation such as to almost defy the imagination. Further, if such a condition did come about, the discriminatory result of the constant-presence theory would be that those airlines which had achieved such

proportions would be rewarded with a tax liability, whereas the lesser airlines would continue to enjoy their tax-immune advantage.

Reconsideration of the Northwest Airlines Case.

An examination of the various decisions which we have discussed herein, we believe, gives rise to the following conclusions with reference to the matter now before the Court:

(1) That, according to the definitely expressed views of each of the members of the Court before whom the *Northwest Airlines case* was heard, the decision in that case did not declare the apportionment doctrine to be inapplicable to flight equipment engaged in interstate air commerce.

(2) That, at the time of the *Northwest* decision, only one member of the Court expressed a view that the apportionment doctrine should never be applied to air commerce under any circumstances.

(3) That, according to the pronouncements of this court, particularly the opinions issued subsequent to the *Miller case*, it is clear that the basis for the imposition of an apportioned ad valorem property tax upon units of a fleet of vehicles continuously engaged in interstate commerce is the regular and habitual use of such units within the taxing state; and it is not a necessary prerequisite to such taxation that some one or more units of such fleet can be found within the taxing state constantly throughout every day of the tax year.

Perhaps we should content ourselves, for the purpose of the matter now before this Court, with limiting our concern over the *Northwest Airlines case* to an observation that the facts in the case at bar could not possibly afford a basis for full value taxation of the flight equipment here involved, as the peculiar domiciliary status which prevailed with respect to the State of Minnesota and was the basis for the decision in the *Northwest case* is entirely lacking in the present situation.

However, the nature of the operation of the air fleet in that case was so similar to the operation now in question—indeed, so typical of all present-day commercial air operations—that we are moved to suggest to the Court the desirability of some reconsideration of the effect of that decision.

We have reference to the implication, which is inferable from some of the language in the opinion announcing the decision of the Court in the *Northwest case*, that notwithstanding the fact it was Minnesota's peculiar domiciliary-home port-main base of operations status which gave rise to the right to impose a full value tax, the other states through which the Northwest fleet operated could not be said to have a right to impose any tax upon any proportion of such fleet. We have previously expressed our conviction that, to the extent such an implication is to be inferred from the language of that particular opinion, such a view was not shared by a majority of the members of the Court and is not in accord with the previous decisions of this Court. We believe that such an implication is not only a fair one, but a necessary

one. The only other implication which can be drawn is that there might be situations in which the Northwest Airlines fleet would acquire a situs for an apportioned tax in the other states through which it operated, and that in such a situation a discriminatory and burdensome form of double taxation would receive judicial sanction. Such a situation could not exist in harmony with the decisions of this Court, many of which cases are cited in the dissenting opinion in the *Northwest case,* the conclusions of which opinion we respectfully submit are those upon which the matter should be reconsidered and resolved. That both a full value tax by a domiciliary state and additional taxes by non-domiciliary states through which an interstate fleet operates will not be permitted is definitely indicated by the unanimous opinion in the recent *Standard Oil case,* supra, wherein the Court said: "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile." (p. 384). Thus, the first requirement to a full value tax by a domiciliary state should be that it shall appear that the vehicles of the interstate fleet are not subject to an apportioned tax by the other states through which the transportation system operates—i.e., that the units of the fleet are not within the other states regularly and habitually, as component parts of a fleet continuously engaged in interstate commerce. What additional conditions are to be required, such as being the main operational base, the place of federal registration, and the like, would depend upon the extent to which the "business fact" aspect of the *Northwest* decision shall be adhered to in the future.

COMMERCE CLAUSE DOES NOT PROHIBIT STATE TAXATION OF INSTRUMENTALITIES OF INTERSTATE COMMERCE.

The appellant herein asserts that, by virtue of the exclusive control over interstate commerce vested in Congress by the Commerce Clause, the State of Nebraska is prohibited from imposing the tax in question.

To support its contention appellant cites *Best & Co.* v. *Omaha,* 149 Neb. 868, 33 N. W. (2d) 150, and declares that the failure of the Nebraska Court to apply the principle of that case in its decision in the case at bar below constitutes reversible error. Examination of the *Best case* clearly demonstrates that the Nebraska Court did not apply the principle therein announced to the case at bar below for the obvious reason that the principle is wholly inapplicable. The *Best case* involved the imposition by a municipality of a privilege tax, not an ad valorem property tax, upon the business of conducting certain interstate commerce within the city. The Court very properly held that such a discriminatory tax upon a foreign corporation for the privilege of doing interstate business within a city was an unlawful burden upon interstate commerce and was violative of the Commerce Clause of the Constitution.

Gibbons v. *Ogden,* 9 Wheaton 1, and *Smith* v. *Turner,* 7 Howard 283, also cited by appellant, are similarly distinguishable. The *Ogden case* involved an act of the New York legislature granting an exclusive franchise to navigation of all waters within its jurisdiction,

and *Smith* v. *Turner* involved a state per capita tax upon alien passengers arriving in state ports. Obviously there is no parallel between those cases and the case at bar where we are considering the imposition of an ad valorem property tax.

McCulloch v. *Maryland,* 4 Wheaton 316, cited by appellant as authority against the taxing powers of states, is wholly inapplicable to the case at bar. That renowned case involved a tax imposed by Maryland upon a bank incorporated under an Act of Congress. As a preliminary observation, it occurs to us that if plaintiff's views as to the meaning of the *MuCulloch case* were shared by this Court, it is logical to assume that most of the recent cases involving state taxation in matters involving interstate commerce would have been decided much differently than is the case.

In *McCulloch* v. *Maryland,* the Maryland legislature, in effect, sought to impose a privilege tax upon the doing of business by any other than state-chartered banks. The decision in the case, of course, was based upon the reasoning that the branch of the Bank of the United States was an agency of the federal government. Actually the case rested upon principles of tax exemption, rather than the lack of power to tax.

Appellant also quotes at some length from various writings of legal scholars, including present and former members of this Court. None of these writings express views inconsistent with an apportioned property tax upon vehicles engaged in interstate commerce. The authors merely declare the far-reaching effect of the Commerce Clause and the fact that the states have

no power to impress regulations which are inconsistent with federal regulations and have no power to do anything which has the effect of unduly burdening interstate commerce. None of the writings cited by the appellant can be construed as prohibiting the imposition of a fairly apportioned property tax by states which have acquired property taxing jurisdiction by reason of the use of instrumentalities of interstate commerce.

The fact that interstate commerce, including air commerce, is subject to the dual jurisdiction of federal and local government in connection with which state governments are free to impose regulations to such extent and in such manner as do not conflict with federal regulations or impose an undue burden upon interstate commerce, is so thoroughly familiar a principle as to require no detailed discussion of authority. There is no dispute but that, in view of the peculiar characteristics of air commerce, that field has been, and should be, more comprehensively regulated by the federal government than is the case with respect to other forms of commerce; but such circumstance in no manner detracts from the complete applicability to air commerce of the principles above expressed.

Appellant seems to have lost sight of the fact that even though "a matter is regulable only by one government, it is not thereby exempted from just taxation by the other." *Stone* v. *Interstate Natural Gas Co.*, 103 F. (2d) 544, aff'd. 308 U.S. 522.

We believe that the authors whom the appellant cites would be quite shocked to learn that they are quoted as authority for the following statement, ap-

pearing at page 46 of Brief of Appellant: "These learned pronouncements on the constitutional provision prove one outstanding thing: Congress and Congress alone has the right to impose a tax upon aircraft engaged in interstate commerce." Were this bold statement correct, it would be quite embarrassing, we should think, for the appellant to explain just how such fact must have escaped the attention of each of the members of the Court in deliberating the *Northwest Airlines case*. We know, as was so succinctly expressed by the unanimous opinion in *Ott* v. *Mississippi Valley Barge Line Co.*, supra, 336 U. S. at 174, that "interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders." This is true, regardless of whether the transportational medium by which such commerce is carried on be land, water or air, or a combination thereof.

There is one portion of Mr. Justice Frankfurter's work, "The Commerce Clause Under Marshall, Taney and Waite," the applicability of which to the position of the appellant herein impresses us. We refer to the following, taken from the words of the Honorable James Bradley Thayer, commencing at page 112 of the volume:

> " '* * * Nothing that is now going forward can exceed the vehemence of denunciation, and the pathetic and conscientious resistence of those who lifted up their voices against many of these supposed violations of the Constitution. The trouble has been, then as now, that men imputed to our fundamental law their own too narrow construction of it, their own theory of its purposes and its

spirit, and sought thus, when the question was one of mere power, to restrict its great liberty.' "

In its effort to escape the legitimate tax burden sought to be imposed upon it, we submit that the appellant herein has advanced its own too narrow construction.

In the argument to sustain its Law Point II, appellant cites several cases for the announced purpose of demonstrating the permissible extent to which states possess "rights to tax instrumentalities or the owners thereof engaged in interstate commerce." The conclusion which appellant draws from the cited cases is that any state taxation must be based upon "use of state facilities" and that the revenue derived from such tax must be devoted exclusively to the creation or maintenance of the specific facilities from which the taxpayer receives some "readily distinguishable benefit conferred by the state."

The inapplicability of the cases cited is patent, as those cases deal exclusively with use or privilege taxes. For example, appellant argues that *Spector Motor Co. v. O'Connor,* 340 U. S. 602, 95 L. Ed. 573, 72 S. Ct. 309, is "an example for the invalidity in the instant case." We are unable to follow appellant's reasoning. The *Spector case* is clearly distinguishable from the case at bar, for the reason that there was involved in the *Spector case* a corporate franchise tax for the privilege of doing interstate business in the state. The court in that case held that the tax was violative of the Commerce Clause and void, even though the amount of the

tax were fairly apportioned to the amount of business done within the state. However, at the same time the court recognized the state might lawfully impose a different form of tax the amount of which might be determined by an apportionment formula similar to the one involved in the case at bar and which might in practical effect be no less a burden upon interstate commerce than the franchise tax. Quoting from the majority opinion, at pages 607, 608, of the U. S. Report:

> "* * * Neither the amount of the tax nor its computation need be considered by us in view of our decision of the case. The objection to its validity does not rest on a claim that it places an unduly heavy burden on interstate commerce * * *. The tax is not levied in lieu of an ad valorem property tax. * * * Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so."

And, further, at page 609:

> "* * * the tax before us attaches solely to the franchise of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities or aspects of this business * * *."

Thus, although the court did not specifically discuss the power of states to impose an apportioned ad valorem property tax it is evident that the Court invalidated the tax in question solely because it was in the form of a boldfaced tax upon the right to do business within the state. There is nothing whatsoever in the opinion which is inconsistent with the existence of the

power of a state to impose an apportioned ad valorem tax upon personal property employed in interstate commerce. In the event the *Spector case* had any application to the issue of ad valorem property taxes, it is reasonable to assume that the Court would have made some reference to the case at the time it considered the more recent cases of *Ott* v. *Barge Line* and *Standard Oil* v. *Peck,* supra, which cases related specifically to ad valorem property taxes by states. In neither of these cases is there any reference to the *Spector case.*

The fact that the decision in the *Spector case* is not inconsistent with, and, in fact, even recognizes the lawfulness of a state apportioned ad valorem tax on personal property used in interstate commerce, is illustrated by the dissenting opinion of Mr. Justice Clark, Mr. Justice Black, and Mr. Justice Douglas, who observed:

> "* * * The Court concedes, or at least appears to concede, that if the Connecticut legislature or highest court had described the tax as one * * * in lieu of an ad valorem property tax, Spector would have had to pay the same amount, calculated in the same way, as is sought to be collected here (by a business privilege tax) * * *." (Parenthetical comment supplied) (p. 611).

Entirely aside from the issue in the *Spector case,* there is some language in the opinion written by Justice Clark, the general aptness of which makes the same appropriate for contemplation in a matter such as is now before the Court. Justice Clark stated:

> "There is nothing spiritual about interstate commerce. It is rarely devoid of significant contacts

with the several states. Hence, this Court has long treated the problems in this field with a flexibility which the competing demands of federal and state governmental spheres have required. In the absence of federal action, this Court has been quick to recognize legitimate local interests and uphold state regulations of activities which admittedly form a part of, or impinge on, interstate commerce. See, e. g., South Carolina State Highway Dept. v. Barnwell Bros., 303 US 177, 82 L ed 734, 58 S Ct. 510 (1938). The same approach is hardly foreign to the field of state taxes * * *." (pp. 612, 613).

Point II.

Pre-emption of the Field of Air Commerce by Congress Does not Prohibit the Imposition of Fair and Reasonable State Ad Valorem Property Taxes Upon Flight Equipment Employed in Interstate Commerce Within the Taxing State.

Appellant also declares that Congress has so completely preempted the field of aviation that there is nothing left which any state might confer by way of reciprocal benefits to the industry; and, the appellant reasons, there being no possible benefits flowing from state governments, the states are completely powerless to impose any property tax upon flight equipment engaged in interstate commerce.

In support of its pre-emption theory appellant cites a number of cases decided by this Court, the first and most recently decided of which is *Public Utilities Commission of the State of California* v. *United Air Lines*, — U. S. —, 98 L. Ed. (Adv.) 99. At page 55 of its brief, appellant sets forth a quotation concerning the pre-emption of air commerce by Congress, which quo-

tation is incorrectly identified as being from the per curiam opinion in that case. Actually the quotation used by the appellant is from the dissenting opinion; whereas the judgment of the Court, as shown by the per curiam opinion, was a reversal of the judgment of the lower court which had declared the Civil Aeronautics Board to have exclusive jurisdiction over the rates involved.

The cases cited by appellant merely affirm that the air is not subject to private ownership or local dominion exercised in such a manner as to enable the exclusion or obstruction of commerce therein; that aircraft operating with federally designated airways must be licensed and certified by federal authority, even though operated entirely within the boundaries of one state; and that Congress has set up a comprehensive scheme for regulation of common carriers by air. We take no issue with any of these propositions. Appellant's citation of these cases is further demonstration of a failure to appreciate the inherent distinction between regulation of interstate operations and taxation of property engaged in interstate operations, to which we have previously referred. *Stone* v. *Interstate Natural Gas Co.*, supra.

In the argument in support of its Law Point IV, appellant strives to avoid the impact of those cases which furnish authority for the imposition of a tax such as involved in the case at bar (e. g., *Standard Oil* v. *Peck, Ott* v. *Mississippi Valley Barge Line Co.*, the *Johnson Oil case*, and the *Pullman Car case*, all supra), by saying that in those cases the property involved had been "within the state sufficiently to attain a taxable situs

therein." This statement, of course, simply begs the issue. However, the futility encountered by the appellant in seeking to distinguish the undeniable effect of those decisions does serve the useful purpose of bringing out into open view the theory upon which the appellant ultimately comes to rest its case. The theory of appellant's case is contained in the following statement, appearing at page 65 of its brief: "The peculiar nature of the aircraft as the incident of the tax precludes a taxable situs. The aircraft in question came in on fourteen regular schedules, but they did not traverse the highways or byways of the State." In other words, the appellant appears to take the position that the circumstance which prevents the existence of a tax situs for flight equipment engaged in interstate commerce is the fact that no use is made of the "highways or byways" of the state. We, of course, contend that use of public roads is in no way prerequisite to the acquisition of a tax situs by instrumentalities of interstate commerce. However, we also dispute the premise of the appellant that no use of public roads is made in the case of interstate air commerce. We suggest that the public roads are used and that the subjects of appellant's interstate commerce receive benefits and protection afforded by the state just as positively as if the airplanes were to taxi about over public roads to initial points of origin and take aboard its cargo, then return to the airport for take off. Further exploring this premise on the basis of a somewhat Rube Goldbergish hypothesis, suppose that as a part of its flight equipment the appellant carried self-propelled surface vehicles which conveyed the interstate cargo from points of origin over public roads to the airport where the cargo was loaded aboard the airplanes.

Although handling precisely the same cargo and operating according to precisely the same interstate schedules, the appellant's theory would permit the taxation of the surface vehicles but would forbid the taxation of the airplanes, simply because the latter did not use the public roads.

In keeping with its premise that some use of public highways is necessary to afford a tax situs over vehicles of interstate commerce in non-domiciliary states, and with the obvious view of avoiding taking a position for outright tax immunity for its flight equipment, the appellant suggests that interstate flight equipment might be taxed according to the old "home port" theory announced in *Gibbons* v. *Ogden* and for many years aplied to ocean-going vessels. In this regard, at page 76 of its brief, appellant makes the rather startling pronouncement: "The law then stands as the law of today." Realizing, of course, that the circumstance is in no way decisive of the issue, nevertheless it is interesting to note there has been no showing that appellant presently is being taxed upon such a basis, and to speculate as to what position the appellant might assume in connection with an independent attempt by some other state to tax its flight equipment under that theory. We suspenct that in such event the appellant, with abrupt awakening, would vigorously point out the fact that the theory has now been completely rejected by this Court; which indeed is the case.

There is very marked distinction between the benefits which support a use tax and the benefits which support a general property tax. In the case of a use tax, of course, there must be some specific use, or, in

the words of the appellant, some "readily distinguishable" reciprocal benefit, to which the tax can be traced; and the funds derived from a direct use tax must be devoted to the creation or maintenance of the facilities of which use is made. However, in the case of a general property tax, such as is involved here, specific tracing of reciprocal benefits or identification of the tax with particular facilities made use of by the taxpayer is not necessary. A most lucid explanation of this aspect of general property taxation in contained in *Union Refrigerator Transit Co.* v. *Kentucky*, supra, 199 U. S. at 203:

> "But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus, every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no building or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. * * *."

The appellant, in its brief, has frequently asserted that it pays ground rental and landing fees in Nebraska, that it pays a Nebraska tax upon aviation fuel and also pays a general ad valorem property tax upon its various properties which are situated and remain upon the ground in Douglas County, Nebraska. On the basis of these facts, the appellant argues that it pays directly for all of the opportunities, benefits or pro-

tection which is afforded it in the State of Nebraska; and, therefore, there are no opportunities, benefits or protection upon the basis of which the Nebraska apportioned tax on its flight equipment can be justified.

By analogy, we may observe that the same thing would be true in the case of rail transportation, for example: Certainly the railroad companies pay directly, either by rental or capital investment, for the physical facilities they employ within the state, and pay a tax upon at least petroleum fuel, and pay a general property tax upon its various properties which remain exclusively within the state. Yet we doubt that the appellant would take the position that railroads are not lawfully subjected to the apportioned ad valorem tax upon their rolling stock which has been applied consistently throughout the course of railroad history.

Furthermore, we take exception to the appellant's assertion that it pays directly for all benefits enjoyed within the State of Nebraska. As we have previously mentioned, although the airplanes do not actually traverse the public roads of the state, the appellant is benefitted and its interstate commerce is enhanced by reason of the existence of public roads over which the subjects of such commerce are conveyed to and from the airplanes. Among the other general opportunities, benefits and protection which is accorded to the appellant, for which the appellant surely is not otherwise paying, are those of security against personal injury, loss or destruction of property and other misfortune, discomfort or inconvenience which is constantly afforded to the ever-changing stream of interstate passengers and cargo which continually passes within

the state by means of appellant's transportation system, and the availability of aid and remedy in any such event. There is even an indirect benefit to the appellant by virtue of the tax sustained school system through which the youth of the state may become enlightened persons who will naturally be inclined to patronize the business of the appellant.

Point III.

A State Ad Valorem Property Tax Upon Vehicles of Interstate Commerce, Apportioned According to Use Within the Taxing State, Does Not Constitute an Impost or Duty Within the Meaning of Article I, Section 9, Clause 5 or Section 10, Clause 2 of the Constitution; Nor Does Such a Tax Constitute Tonnage Duty Within the Meaning of Article I, Section 10, Clause 3 of the Constitution.

Appellant has neither advanced nor argued any point of law to the effect that the Nebraska taxing statute here involved is violative of Article I, Section 9, Clause 5, Article I, Section 10, Clause 2 or Clause 3, of the Constitution of the United States. However, in view of the appellant's reference to these constitutional provisions as being involved (p. 7 Brief of Appellant) and the mention of the Tonnage Clause in the Specifications of Error herein (p. 25, par. 4, Brief of Appellant), we feel that the matter should not be entirely ignored by us.

Article I, Section 9, Clause 5, insofar as pertinent here, and Article I, Section 10, Clause 2, prohibit states from laying imposts or duties. It has become well established that these constitutional provisions have

reference to direct charges upon the goods moving in interstate commerce, as opposed, for example, to an ad valorem property tax upon the vehicles engaged in such commerce. *Stone* v. *Interstate Natural Gas Co.*, supra; *Western Md. R. Co.* v. *Rogan*, 340 U.S. 520, 95 L. Ed. 501; *Canton R. Co.* v. *Rogan*, 340 U.S. 511, 95 L. Ed. 488.

Article I, Section 10, Clause 3, prohibits the imposition of tonnage duties by the states. Tonnage duty, within the meaning of the Constitution, is a direct charge for access to a port or harbor. *Parkersburg & O. R. Transp. Co.* v. *City of Parkersburg*, 107 U.S. 691, 27 L. Ed. 584, 2 S. Ct. 732; *Clyde Mallory Lines* v. *State of Alabama*, 296 U.S. 261, 80 L. Ed. 215, 56 S. Ct. 194. However, it has been held that the Tonnage Clause does not prohibit state charges, even though graduated according to tonnage, for specific services rendered or a reasonable charge for vessels entering port. *Clyde Mallory Lines* v. *State of Alabama*, supra.

Clearly, these provisions of the Constitution have no applicability in a case such as this.

Point IV.

This Court Will Indulge Every Presumption in Favor of a State's Right to Tax and Will Interfere Only When a Clear and Demonstrated Usurpation of Power Exists.

In a case such as this which may depend upon some rather close interpretations with respect to a novel situation, we submit that it is proper to pay con-

siderable respect to the proposition that this Court will indulge every presumption in favor of a state's right to tax and will interfere only when a clear and demonstrated usurpation of power exists. *Green* v. *Frazier*, 253 U. S. 233, 64 L.Ed. 878, 40 S. Ct. 499.

Also deserving of consideration is the proposition that to be able to find fault with a statute is not to demonstrate its invalidity. *Salsburg* v. *Maryland*, — U.S. —, 98 L. Ed. (Adv.) 207.

Point V.

In a Situation Involving Situs For the Imposition of a State Apportioned Ad Valorem Property Tax Upon Vehicles Engaged in Interstate Commerce, Wherein Representatives of the Taxing Authority Have Stated that the Statute in Question Cover an Average Portion of the Property Within the State Throughout the Taxing Year, a Claim that the Property Acquired no Situs For Taxation Within Such State Will be of No Avail in the Absence of Any Showing of a Lack of Administrative or Judicial Remedy For Correcting Errors of Assessment Within the State.

It is the personal view of counsel for the appellees that the Nebraska taxing statute now under consideration by this Court can be and should be sustained upon the basis of the reasoning expressed and the authorities advanced hereinbefore. However, we also feel that we would be deficient in the discharge of our duty to those whom we represent were we to neglect appropriate measures to place this case fully within the application of *Ott* v. *Mississippi Valley Barge Line Co.*, supra.

As has been previously mentioned herein, in the *Mississippi Valley Barge Line case,* there was an apparent factual controversy as to whether the vehicles there involved were used within the taxing state in such a manner as to have acquired a tax situs. In considering that feature of the case, the Court said, at page 175 of the U. S. Report:

> "We do not stop to resolve the question. Louisiana's Attorney General states in his brief that the statute 'was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the taxing year.' Appellees do not suggest an absence of any administrative of judicial remedy in Louisiana to correct errors in the assessment."

Accordingly, we state that the Nebraska statute here involved is intended to, and does, cover an average portion of property permanently within the state—and by permanently is meant throughout the taxing year; and we invite the attention of the Court to the fact that the appellant does not suggest an absence of any administrative or judicial remedy in Nebraska to correct errors in assessment.

CONCLUSION.

We submit that the following conclusions with respect to the case at bar are clearly established:

(1) That the State of Nebraska has the right to impose an ad valorem personal property tax upon flight equipment of the appellant which is regularly and habitually used and employed within the state as a part of a system of continuous interstate air com-

merce over fixed routes and according to regular schedules; and that no repugnance to the Constitution of the United States will occur by reason of such tax, so long as the allocation of the proportionate part of the property value and the levy thereon bear a fair and reasonable relation to the use of such equipment within the state.

(2) That the method of taxation prescribed by the Nebraska statute here under consideration and the application thereof to the flight equipment of the appellant is of such a nature that the resulting tax does bear a fair and reasonable relation to the use of such property within the state.

The judgment of the Supreme Court of Nebraska herein should be affirmed.

Respectfully submitted,

Clarence S. Beck,
Attorney General,

C. C. Sheldon,
Assistant Attorney General,
of Lincoln, Nebraska,
Counsel for Appellee.